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Supreme Court, U.S.  
FILED

No. 05 - 84 3 NOV - 8 2005

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IN THE  
  
SUPREME COURT OF THE UNITED STATES

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SERGIO DURAN BADILLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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*ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT*

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**PETITION FOR WRIT OF CERTIORARI**

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## **Question Presented For Review**

### **1. WHETHER THE FIFTH AND SIXTH AMENDMENTS' GUARANTEE OF DUE PROCESS, FAIR TRIAL AND JURY TRIAL IS VIOLATED BY A PERMISSIVE INFERENCE INSTRUCTION CONCERNING THE SOLE ISSUE BEFORE THE TRIER OF FACT**

In this case, the Tenth Circuit affirmed a permissive inference jury instruction concerning the sole issue (of knowledge) in dispute and affirmed the imposition of a sentence enhancement (obstructing justice) based on the jury verdict. The permissive instruction violates the Fifth Amendment's Due Process Right to fair trial, the Sixth Amendment Right to fair trial and jury determination, and Article III's implementation of the Court's supervisory powers over lesser courts to insure fair trial. The inference affected both verdict and sentencing.

Any presumption instruction is constitutionally infirm. Even a "permissive presumption" interferes with fundamental constitutional guarantees of due process and fair trial. In a jury trial such as *Badilla's*, the jury and not the court is the ultimate fact finder. The court interferes with the jury role when it tells a jury they may presume facts from evidence. When the court does so, it steps down from its constitutional role of impartiality (for justice is blind) and assists the government in proving its case. The presumption skews the burden of

proof and the presumption of innocence. It is a fallacy to suggest the permissive nature of the instruction cures constitutional defect. The presumption gives the jury an instruction manual on how to resolve ultimate issues. To say "you don't have to use the manual" ignores reality. It not easy to sit in judgment. A juror uses the manual to make his or her job easier.

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**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

Petitioner Sergio Duran Badilla requests this Court issue a Writ of Certiorari to review the judgment, decree and order of the Tenth Circuit Court of Appeals entered August 17, 2005 in appellate cause No. 03-2183.

**Opinion and Orders Below**

The published order, judgment and decision of the Tenth Circuit Court of Appeals in United States v. Sergio Duran Badilla, CA#03-2183 was filed on August 17, 2005 and is attached hereto as Appendix A. The case was before the Tenth Circuit after remand by



this Court in Cause # 04-762. The prior decision of the Tenth Circuit was vacated and the matter remanded in light of the Court's decision. USA v. Booker, 125 S.Ct 738(2005).

### **Statement of Jurisdiction**

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) and §210(c), to review the Judgment, Decree and Order of the Tenth Circuit Court of Appeals issued in this case on August 12, 2004. This Petition for Writ of Certiorari is mailed within 90 days of August 12, 2004; is timely filed; and is served pursuant to Rules 13(3) and 29(4), Rules of the Supreme Court of the United States.

### **Constitutional Provisions**

- 1) Fifth Amendment to the United States Constitution provides in relevant part:

No person shall be deprived of life, liberty or property without due process of law;

- 2) Sixth Amendment to the United States Constitution provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury;

- 3) Article III, United States Constitution, §1, provides:

The Judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

## Statement of the Case

### A) Facts

Mr. Badilla was indicted and convicted for knowingly and intentionally possessing more than 100 kilograms of marijuana with intent to distribute in violation of 21 U.S.C. §841(a)(1) and (b)(1)(B) and 18 U.S.C. §2. Mr. Badilla exercised his right to jury trial; he took the stand in his own defense and testified under oath that he had no knowledge of the 217 kilograms of marijuana, wrapped in 37 individual bundles and found in a hidden compartment which ran the length of his truck bed.

Mr. Badilla was the sole occupant of the pickup truck. The pickup truck was stopped at a Border Patrol Checkpoint near Truth or Consequences, New Mexico. After a K-9 alerted at a secondary checkpoint, a search was conducted and the marijuana discovered in the hidden compartment. The only issue (contested by Mr. Badilla at his trial) was whether or not he knew the marijuana was located in the secret compartment of his vehicle.

Over Mr. Badilla's objection, the Trial Court gave the following instruction:

*With respect to the question of whether or not the Defendant knew that a controlled substance was present, you may-but are not required to-infer that the driver and sole occupant of the vehicle has knowledge of the controlled substance within it.*

In addition to the above instruction, the Court gave several more inference instructions including:

1. When knowledge of the existence of a particular fact is an element of the

offense, such knowledge is established if a person is aware of the high probability of its existence, unless he actually believes that it does not exist.

2. Knowledge can be inferred if the Defendant deliberately blinded himself to the existence of a fact that otherwise would have been obvious to him.<sup>1</sup>

At sentencing, the District Court Judge added an enhancement of two levels pursuant to U.S.S.G. §3C1.1. The Trial Court found Mr. Badilla willfully impeded or obstructed justice by denying his knowledge under oath at his trial and before the jury.

Although Mr. Badilla objected to the enhancement, he did not raise the issue recently resolved by this Court in Blakely v. Washington, 124 S.Ct. 2531(2004). Mr. Badilla's case was fully briefed by March 2004; argued in the first week of May, 2004 and decided approximately seven weeks after this Court's decision in Blakely. By Motion, Mr. Badilla requested the Tenth Circuit consider this Court's decision in Blakely; apply Blakely to United States Sentencing Guidelines; and vacate the enhancement. Since Mr. Badilla had not raised the Blakely issue at the District Court, the Circuit Court declined to reverse Mr. Badilla's sentence under plain error review.

Mr. Badilla filed a Petition for Writ of Certiorari which was granted by this Court. After deciding USA v. Booker, 125 S.Ct 738(2005) the opinion below was vacated and the matter remanded.

After remand, the Tenth Circuit upheld the permissive instruction, relying on Ulster County v. Allen, 442 U.S. 140(1979). In

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<sup>1</sup> Mr. Badilla only objected to the italicized instruction. Supra. All instructions can be found in Appendix two.

refusing to remand to District Court for re-sentencing the Circuit Court held that Mr. Badilla had not been denied a substantial right and therefore no further review was necessary.

The issue was whether it was appropriate for the District Court to consider "perjury or obstruction of justice" in determining Mr. Badilla's sentence. The Circuit Court held it was appropriate as the enhancement was Blakely complaint. Since the jury had discounted Mr. Badilla's sworn testimony in its verdict, the jury "must necessarily found the Badilla's testimony...was false." See Appendix 1, Opinion of Tenth Circuit. The sentence, like the verdict, is infected by the permissive instruction.

## **B) Related Case**

Mr. Badilla notes the existence of a second case, United States v. Cota-Meza, 367 F.3d 1218(10<sup>th</sup> Cir. 2004), previously before this Court on Petition for Writ of Certiorari from the Tenth Circuit on the same issue. In both decisions, the Tenth Circuit, with two different panels sitting, noted that the permissive instruction in question was not a model of clarity and that the Court (Tenth Circuit) would not have chosen to so instruct a jury. The Tenth Circuit notes that permissive inference instructions have been roundly criticized for wrongfully influencing a jury. However, in both cases, the Tenth Circuit stated that "a permissive instruction is valid if there is a rational connection between the fact that the prosecution proved and the ultimate fact presumed, and the latter is more likely than not to flow from the former". Both cases permit the Trial judge to make the threshold decision concerning "more likely than not". Both cases see no constitutional impediment to the giving of the instruction citing Ulster County v. Allen, 442 U.S. 140(1979). The Tenth Circuit declined to use its supervisory powers to exclude the permissive inference instruction in cases where the inference goes to the only issue before the trier of fact. The Court has declined to accept jurisdiction over the Writ in Cota-Meza's case.